

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
	)	
NFL Enterprises LLC,	)	MB Docket No. 08-214
Complainant	)	File No. CSR-7876-P
v.	)	
Comcast Cable Communications, LLC,	)	
Defendant	)	
To:	Marlene H. Dortch, Secretary Federal Communications Commission	
Attn:	Richard L. Sippel Chief Administrative Law Judge	

**DEFENDANT’S OPPOSITION TO EXPEDITED  
MOTION TO COMPEL PRODUCTION OF DOCUMENTS**

Comcast Cable Communications, LLC (“Comcast”), by its attorneys and pursuant to Section 1.294(b) of the Commission’s rules, hereby opposes the Expedited Motion to Compel Production of Documents filed by NFL Enterprises LLC (“NFL”) on March 3, 2009.<sup>1</sup>

The NFL’s expedited motion to compel documents should be denied. It is not ripe because the parties are in the middle of discussions regarding the NFL’s flawed requests, and the NFL has prematurely moved to enforce them. That the discussions are still taking place at this point in time is a function of the NFL’s delay in initiating discussions regarding Comcast’s objections and responses to the NFL’s document requests, and then in following up on the first discussion.

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<sup>1</sup> *In re NFL Enters. LLC v. Comcast Cable Commc’ns, LLC*, Expedited Motion to Compel Production of Documents, MB Docket No. 08-214, File No. CSR-7876-P (filed Mar. 3, 2009).

As to Request No. 4, the NFL's motion is based on the mischaracterization that Comcast "has maintained that it will produce no agreements in response to Request No. 4." Mot. at 7. To the contrary, the parties conferred about that inscrutable and overreaching request, and Comcast is still waiting for the NFL's response to the question that Comcast posed and the NFL was unable to answer at the time: "What does the NFL want in response to the request?" While the parties were in the process of scheduling a continuation of that discussion, the NFL filed its unripe motion, needlessly imposing on the Presiding Judge.

Regardless, as shown below, the fatal ambiguity and implicitly conceded overbreadth of the NFL's Request No. 4 are independent reasons for denying the NFL's motion. Further, the NFL has failed to show that Request No. 4 will yield probative documents.

As to Request No. 1, Comcast already has produced to the NFL several responsive affiliation agreements, including affiliation agreements for Versus and The Golf Channel with Comcast (as distributor) and, pursuant to its counterparties' consent, DIRECTV and DISH. In addition, Comcast has agreed to produce agreements between Versus and The Golf Channel and the rest of the eight largest distributors plus the National Cable Television Cooperative (NCTC) if and when Comcast receives consent to do so.

As with Request No. 4, the parties were discussing the scope of Comcast's response to Request No. 1 when the NFL filed its expedited motion to compel. As discussed between them, the parties' disputes over Request No. 1 principally concerned whether Comcast would produce affiliation agreements with the top

eight distributors plus the NCTC (as Comcast offered) or for the top ten distributors (as the NFL demands). Because the eight distributors plus NCTC together account for more than 95% of U.S. pay television households, the NFL's insistence on obtaining the top ten distributors' agreements will yield little, if any, additional benefit.

In any event, Comcast should be permitted to seek the necessary consent from its counterparties before being compelled to produce any affiliation agreements. Those agreements are considered distributors' and networks' crown jewels, and generally are among the most confidential documents possessed by those companies. At a minimum, fairness to counterparties requires that Comcast should not be compelled to produce any affiliation agreement until Comcast's counterparty has had a meaningful opportunity to be heard in opposition to the NFL's motion.

Finally, the NFL's argument that it will be greatly prejudiced if the requested documents are not produced immediately, Mot. at 4 & 7, rings hollow in light of the NFL's representations to the Presiding Judge that "virtually all of the evidence that we anticipate submitting is in already." 11/25/08 Hearing Tr. at 106; *see also id.* at 96 ("we don't anticipate offering much evidence on the violation issue beyond that which accompanied our complaint").

**A. The Presiding Judge Should Not Compel Comcast to Produce Documents in Response to Request No. 4**

In its motion, the NFL asks the Presiding Judge to enforce the following flawed request:

“4. All agreements and draft agreements concerning [Comcast’s] receipt of any payment, preferential arrangements, any other consideration or anything else of value, tangible or intangible (including programming concessions on other services), in connection with [Comcast’s] carriage of any independent sports network on any tier or package other than the Sports Entertainment Package tier.”

Comcast timely objected to this request on several grounds, *see* Mot. Ex. C at 8-9, and in its discussions with the NFL, Comcast pointed out that the request is fatally ambiguous.

One fundamental ambiguity in the request is how Comcast is supposed to determine whether an agreement is responsive. All of Comcast’s affiliation agreements with so-called “independent sports networks” (and all other networks) obviously provide for Comcast to receive “consideration” and things “of value.” Thus, if any such agreement also provides for carriage other than on Comcast’s sports tier, the question arises how Comcast can determine whether “consideration” is “in connection with” carriage for purposes of responding to the request.

In an attempt to make sense of the NFL’s request, Comcast formulated an answer to that question in its written response to the request:

“[Subject to its objections], Comcast will conduct a reasonable search and produce – contingent on the consent, to the extent required, of third parties – responsive carriage agreements for any Independent Sports Network for which Comcast has received consideration (other than a license to distribute programming warranting broader distribution and other terms typically found in Comcast’s carriage agreements) specifically in exchange for not distributing the network solely on the Sports Entertainment Package.”

Mot. Ex. C at 9.

While subsequently discussing the request with Comcast, the NFL expressed concern that Comcast's reading may be too narrow, yet acknowledged that it did not want all of Comcast's agreements with so-called "independent sports networks" not carried on a sports tier. Significantly, however, the NFL itself was unable to articulate how to determine whether "consideration" under an agreement was "in connection with" carriage for purposes of responding to the request. The parties agreed to discuss this issue further – and, contrary to the NFL's claim, Comcast never refused to produce documents in response to the request.<sup>2</sup> But the NFL jumped the gun and moved to compel before a follow-up discussion was even scheduled.

This is only one of the fatal flaws in the NFL's Request No. 4. In another, the NFL defines an "independent sports network" as "any program service in which no MVPD holds a financial interest and that provides substantial programming relating to sports events." Mot. Ex. A at 5 (Schedule B,

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<sup>2</sup> The NFL appears to be referring to an e-mail exchange in which Comcast's counsel was asked whether Comcast had sought consent from any counterparties to produce affiliation agreements responsive to Request No. 4 yet, and counsel responded:

"With regard to your inquiry about affiliation agreements with independent sports networks, we do not believe that subject to our objections – which the parties began discussing during our call on February 18th – there are any responsive agreements. We look forward to continuing our ongoing discussion of this issue with you."

Thus, contrary to the NFL's representation, Comcast did not state that it would produce "no agreements in response to Request No. 4" but rather that Comcast was awaiting further clarification from the NFL regarding how to determine which agreements the NFL is requesting.

Definition 9). Comcast formally objected to this definition as ambiguous, the parties discussed the ambiguity of the term “financial interest” at length, and the NFL told Comcast that it would try to articulate more clearly what it means by “financial interest.” Again, Comcast was waiting for clarification from the NFL when the NFL instead filed an expedited motion to compel.<sup>3</sup>

In its motion to compel, the NFL has re-cast Request No. 4 to demand:

“any affiliation agreements that Comcast, acting as an MVPD, has entered into with an independent sports network, in which Comcast has received some form of consideration other than a license to distribute the sports network *in exchange for* carriage on any tier or package other than the Sports Entertainment Package tier.”

Mot. at 8 (emphasis added). But this restatement does not resolve the ambiguity. It simply replaces the question whether certain consideration was “in connection with” carriage with the question whether certain consideration was “in exchange for” carriage. Moreover, the qualifier “other than a license to distribute the sports network” magnifies the ambiguity because the NFL fails to explain how to determine whether carriage is “in exchange for” “a license to distribute the sports

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<sup>3</sup> Ironically, the NFL argues in its pleadings that a “financial interest” includes a right to license programming, 7/10/08 NFL Reply ¶ 65, and a “program service” includes “programming,” *id.* ¶ 68. As a matter of interpreting 47 CFR § 76.1301(a), the NFL is dead wrong. But if the NFL’s own definitions of those terms are applied to the defined term “independent sports network” in the NFL’s own document requests, then there would be no “independent sports network” with which Comcast has an affiliation agreement. That is, if any MVPD has a right under an affiliation agreement to license a network’s programming, then under the NFL’s own definitions the MVPD would have a “financial interest” in a “program service,” bringing the network outside the NFL’s definition of an “independent sports network.” See Mot. Ex. A at 4 (Schedule B, Instruction No. 1).

network” or some other undefined “consideration” – absent a provision in the agreement specifying as much.

In any event, the NFL has failed to justify why it is entitled to *any* of Comcast’s affiliation agreements with so-called “independent sports networks” that Comcast does not carry on a sports tier. The NFL argues that Request No. 4 “requires Comcast either to admit that it carries *no* independent sports networks outside of the Sports Entertainment Package – an admission that would confirm its discrimination against such networks – or to disclose the consideration, other than a license to distribute programming, that it obtained from independent programmers in exchange for that broad carriage.” Mot. at 5 (second emphasis added).<sup>4</sup>

To the extent that the NFL is suggesting that it is entitled to the opportunity to try to conjure some connection between certain consideration and carriage, that would be nothing more than an unwarranted fishing expedition. The NFL has not even attempted to argue that the NFL Network is comparable to *any* of the “independent sports networks” whose affiliation agreements it seeks. Indeed, given the NFL Network’s bloated license fee and its paltry offering of only eight live, regular season NFL games that also are simulcast on free over-

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<sup>4</sup> It is public knowledge that Comcast carries so-called “independent sports networks” – including, among many others, ESPN – outside Comcast’s Sports Entertainment Package, and the NFL has acknowledged as much in its discussions with Comcast regarding Request No. 4. Accordingly, the NFL’s suggestion that a state of affairs that it knows does not exist would confirm “discrimination” by Comcast constitutes an unfair attempt to impugn Comcast.

the-air television in the teams' home markets and very little other live game programming, the NFL cannot do so.

Even if the NFL could show that the NFL Network is comparable to an "independent sports network" that Comcast carries outside a sports tier, that would not justify the NFL's demand that Comcast's produce its affiliation agreement with that other network. Suppose, hypothetically, that Comcast received rights to video-on-demand (VOD) under that agreement (or any other consideration often found in affiliation agreements); even if the NFL somehow could show that the provision of VOD (or other ordinary consideration) under that agreement was related to carriage outside a sports tier, that would not prove anything relevant to the NFL's claims against Comcast. The NFL simply has failed to justify how Request No. 4 will yield probative evidence.

Finally, permitting the NFL to rummage through Comcast's affiliation agreements with "independent sports networks" would not only be unduly burdensome to Comcast, but it also would needlessly implicate the confidentiality interests of Comcast's counterparties.

**B.     The Presiding Judge Should Not Compel Comcast to Produce Documents in Response to Request No. 1**

The NFL's motion to compel also should be denied as to the NFL's Request No. 1, which demands:

"All agreements and draft agreements concerning any MVPD's carriage of any of the Affiliated Networks."

Mot. Ex. A at 3. Comcast interposed several timely objections to this request and, subject to those objections, offered to

“conduct a reasonable search and produce responsive carriage agreements [for Versus and The Golf Channel] by the eight largest MVPDs, contingent on the consent, to the extent required, of third parties.”

Mot. Ex. C at 7.

As stated above, Comcast has produced affiliation agreements between Versus and The Golf Channel and three of the eight largest distributors (Comcast, DIRECTV and DISH). Further, Comcast is ready to produce the agreements between Versus and The Golf Channel and the remaining five of the eight largest distributors plus NCTC from whom Comcast is awaiting responses to its requests for consent, and Comcast will do so if and when such consent is received. These distributors plus NCTC account for 95% of U.S. pay television households.

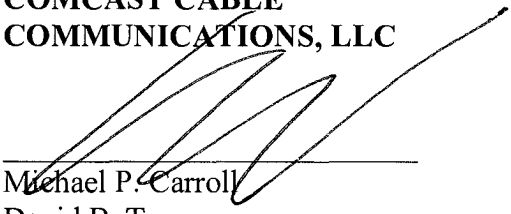
Under these circumstances, the NFL’s expedited motion to compel appears to be an attempt to deny Comcast’s counterparties the opportunity to have input into whether or not their affiliation agreements with Versus and The Golf Channel are produced to the NFL. Again, fairness to those counterparties requires that they have a meaningful opportunity to be heard in opposition to the NFL’s motion.

**CONCLUSION**

For these reasons, the NFL's Expedited Motion to Compel Production of Documents dated March 3, 2009 should be denied.

Respectfully submitted,

**COMCAST CABLE  
COMMUNICATIONS, LLC**



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Michael P. Carroll  
David B. Toscano  
Antonio J. Perez-Marques  
Jennifer A. Ain  
DAVIS POLK & WARDWELL  
450 Lexington Avenue  
New York, NY 10017  
(212) 450-4547

David H. Solomon  
L. Andrew Tollin  
Robert G. Kirk  
J. Wade Lindsay  
WILKINSON BARKER KNAUER,  
LLP  
2300 N Street, N.W., Suite 700  
Washington, D.C. 20037  
(202) 783-4141

James L. Casserly  
Michael H. Hammer  
Megan A. Stull  
Michael Hurwitz  
WILKIE FARR & GALLAGHER  
LLP  
1875 K Street, N.W.  
Washington, D.C. 20006  
(202) 303-1000

Its Attorneys

Dated: March 3, 2009

**CERTIFICATE OF SERVICE**

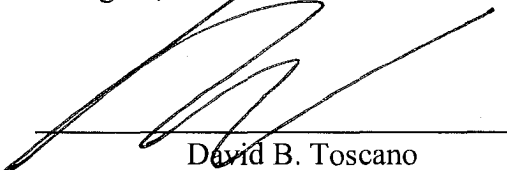
I, David B. Toscano, hereby certify that, on March 3, 2009, copies of the attached Motion for Approval of Protective Order were served by e-mail on the following individuals:

Jonathan D. Blake  
Gregg H. Levy  
Paul Schmidt  
Robert M. Sherman  
Leah E. Pogoriler  
Covington & Burling LLP  
1201 Pennsylvania Avenue, N.W.  
Washington, D.C. 20004

The Honorable Richard L. Sippel  
Chief Administrative Law Judge  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, D.C. 20554

Kris Anne Monteith  
Gary P. Schonman  
Elizabeth Mumaw  
Enforcement Bureau  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, D.C. 20554

Mary Gosse\*  
Office of Administrative Law Judges  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, D.C. 20554



David B. Toscano

\* Courtesy copy